Supreme Court of the United States

October Term, 1978

No. 78-490

Houston Distribution Services, Inc. and
Southwest Warehouse Services, Inc.
Petitioners,

v.

National Labor Relations Board,
Respondent.

APPENDIX

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Cases No. 23-CA-5448, 23-CA-5497

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HOUSTON DISTRIBUTION SERVICES, INC.
AND SOUTHWEST WAREHOUSE SERVICE[1]
and
TEAMSTERS FREIGHT, TANK LINE &
AUTOMOBILE INDUSTRY EMPLOYEES
LOCAL UNION NO. 988

Robert L. Penrice, Esq., of Houston, Texas, for the General Counsel.
David T. Maddox, Esq., and *Robert T. Sabom, Esq. (Dyche, Wright, Sullivan, Bailey & King)* of Houston, Texas for the Respondent.
James P. Wolf, Esq., (Dixie, Wolf & Hall), of Houston, Texas, for the Charging Party.

DECISION

Statement of the Case

JOEL A. HARMATZ, Administrative Law Judge: This case was heard in Houston, Texas, on March 8, 9 and 10, 1976, upon an original charge filed on February 4, 1975, and a consolidated complaint issued on December 22, 1975,[2]

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[1] The caption appears as amended at the hearing, *sua sponte*, by the undersigned to reflect the single employer status of Houston Distribution Services, Inc., and Southwest Warehouse Service, which is discussed more fully *infra*.

[2] At the hearing, on request of the General Counsel, I approved withdrawal of paragraph 12 of the complaint, alleging that Respondent violated Section 8(a)(1) of the Act by threatening employees with a loss of benefits and jeopardy of their jobs if they supported a union, by coercively interrogating employees, and by creating the impression of surveillance.

alleging that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire certain named employees and by discharging others, and violated Section 8(a)(5) and (1) of the Act by refusing, as a successor employer, to recognize the Union as exclusive representative of employees in the appropriate bargaining unit. In its duly filed answer, Respondent denied that any unfair labor practices were committed. After close of the hearing, briefs were filed by the General Counsel, the Charging Party, and the Respondent.

Upon the entire record in this proceeding, including my observation of the witnesses while testifying, and after due consideration of the post-hearing briefs, I make the following:

Findings of Fact

I. Jurisdiction and the Single Employer Issue

Houston Distribution Services, Inc., herein called HDS, is a Texas corporation, with a place of business in Houston, Texas where it operates a public warehouse referred to herein as the Spikewood facility. During the 12-month period preceding issuance of the complaint, a representative period, HDS provided warehousing services to Phillips Petroleum, an employer over which the Board would assert jurisdiction, exceeding $50,000 in value.

Based upon the foregoing, I find that HDS is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

At the outset of the hearing, Counsel for the Respondent submitted a formal motion to dismiss the complaint on grounds that all matters complained of therein related exclusively to a Texas corporation known as Southwest Warehouse Services, Inc., herein referred to as Southwest. That motion was denied on the basis of factual representations by Counsel for the Respondent in support of said motion which established that HDS and Southwest were at a minimum, joint venturers or joint employers, and further that HDS was in fact the *alter ego* of Southwest. Later, in the course of the hearing, certain clarifying evidence established beyond question that HDS and Southwest constituted a single-employer within the meaning of the Act.

Thus, in reaffirming my findings in this respect I note that HDS is a wholly-owned subsidiary of Southwest. Gary R. Stillwell, the president of HDS and Southwest, owns all the outstanding stock on Southwest.

The issues in this case originate with acquisition by HDS of a warehouse formerly operated by Shippers Transportation Services, herein referred to as S.T.S. Prior thereto, HDS had no functional existence; it had been incorporated by Stillwell in connection with his plans for acquisition of additional warehouses. Stillwell decided that HDS would exist as an operating entity, with no rank-and-file employees. Thus, when HDS assumed control of the Spikewood warehouse, it operated under a formal agreement with Southwest, whereby the latter agreed to provide all labor and administrative services to HDS, with HDS, in turn, to compensate Southwest at 125 percent of the total labor cost.

Daniel L. Barrett was designated by Stillwell to hold positions as vice president and general manager of HDS. Barrett interviewed and hired the personnel employed by Southwest at the Spikewood warehouse. James McGee, who became assistant warehouse supervisor at Spikewood also held that position on designation by Stillwell. Barrett had immediate responsibility for all operations at Spikewood

and was entrusted with authority necessary to the supervision, discipline, hiring and discharge of Southwest employees at that location.

Stillwell, himself, also was highly active in the day-to-day operations of both HDS and Southwest. He reviewed actions by Barrett in hiring, himself effected discharges of Southwest employees working at the Spikewood facility, and consulted regularly with Barrett and McGee concerning operations at that facility. Stillwell admits to active participation in the management of both Southwest and HDS and specifically concedes that he would make significant decisions affecting the capital or profit and loss position with respect to either firm.

From the foregoing it is apparent that HDS and Southwest are subject to common ownership and control, that they operate under a labor relations policy formulated by Stillwell, and that they have no separate functional identity apart from their integrated role in furthering the public warehouse interests of Gary Stillwell. Accordingly I reaffirm my finding that Southwest and HDS constitute a single-employer within the meaning of the Act and further conclude that both are merely the *alter ego* of Gary Stillwell, thereby rendering them jointly responsible for unfair labor practices found herein. HDS and Southwest are collectively referred to as the Respondent. Since HDS and Southwest constitute a single employer, there is no merit in Respondent's defenses based on the claim that Southwest rather than HDS was the real party in interest in this proceeding.

II. The Labor Organization Involved

The complaint alleges, the answer, as amended at the hearing, admits, and I find that Teamsters Freight, Tank

Line & Automobile Industry Employees Local Union No. 988 is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Issues

This proceeding arises from Respondent's acquisition of a public warehouse which had been previously manned by employees represented by Local 988. Upon Respondent's assumption of control of the warehouse it declined to recognize and bargain with Local 988. The General Counsel contends that this refusal to bargain violated Section 8(a)(5) and (1) of the Act, and further asserts that Respondent engaged in various acts of discrimination to avoid dealing with the Union. More specifically the issues presented are set forth chronologically, as follows:

1. Did Respondent violate Section 8(a)(3) and (1) of the Act in its refusal to hire Andrew Loring, Lawrence Buckner, R. B. Hammonds, Nehmiah C. Alexander, Eddie Lee Armstrong, Eugene Plater, Phillip Ware, and Emmett Lewis, all former employees of S.T.S. warehouse?

2. Was Respondent a successor employer within the meaning of the Act, so as to have violated Section 8(a)(5) and (1) by its refusal, upon Local 988's request, to recognize and bargain with that Union?

3. Did Respondent violate Section 8(a)(3) and (1) of the Act by discharging employees Clifford Davis, Curtis Mack, Raymond Mills, and Nathaniel Jones, all former employees of S.T.S. who were hired by Respondent, but thereafter terminated on March 4, 1975?

B. Background

1. Local 988's bargaining history.

Local 988's representation of the warehouse employees at Spikewood evolves from Case 23-RD-212. In that proceeding the Board certified Local 988 as exclusive bargaining representative for a unit of truckdrivers, helpers and mechanics employed by Port Houston Transportation Corporation. Apparently at the time of said certification, Port Houston Transportation Corporation was not engaged in warehousing and hence the unit involved consisted essentially of truckdrivers. Subsequently, Port Houston Transportation Corporation was purchased by S.T.S., which continued to recognize Local 988 in said unit. In 1972, S.T.S., having augmented its trucking operation by acquisition of the Spikewood warehouse, in conjunction with Local 988, voluntarily added two new classifications to the existing unit; namely, warehousemen and tow motor operators.

In 1973, S.T.S., apparently without bargaining with Local 988, attempted unilaterally to eliminate its direct involvement in the trucking operation by converting its truckdrivers to independent contractors. Such action was taken by S.T.S. with respect to those drivers who are willing to purchase their trucks. Those who declined were transferred to warehouse classifications.[3] In the interim

[3] Local 988 filed unfair labor practice charges based upon the action of S.T.S. in this regard. However, no complaint was issued thereon in view of the determination by the General Counsel that the matters in dispute could best be resolved by arbitration pursuant to the Board's policy set forth in *Collyer Insulated Wire*, 192 NLRB 837. Accordingly, the matter was submitted to arbitration, and on May 12, 1975, well after Respondent's acquisition of the Spikewood warehouse, arbitrator Charles R. Milentz issued an award, restoring the truckdriver classification to the bargaining unit and directing S.T.S. to reinstate in that position six employees transferred to the warehouse.

between the conversion of the truckdrivers to independent contractors, and February 3, 1975, when Respondent actively began operations at the Spikewood warehouse, the only employees continuing on active payroll status with S.T.S., were warehousemen and tow motor operators.

2. Respondent's Acquisition of the Spikewood Warehouse

At all times material, the Spikewood warehouse was owned by J. Weingarten Company. S.T.S. leased those premises from Weingarten, and in 1974 following financial difficulties, and its inability to make timely rental payments, S.T.S. began negotiating with Gary Stillwell for the sale of its assets including use of the Spikewood warehouse. Those negotiations began in October 1974, and resulted in formal agreement on December 28, 1974.

Upon conclusion of those negotiations, Stillwell was engaged in warehousing operations at a location known as the Katy Freeway facility. Stillwell conducted that operation through Respondent Southwest. However, Southwest was not a party to the agreement which resulted in Stillwell's acquisition of the Spikewood facility. Instead, S.T.S. and HDS were the sole parties thereto. Prior to the commencement of operations by Respondent at Spikewood, HDS and Southwest executed a "management agreement" whereby Southwest agreed to provide various support services to HDS including "all labor necessary for the warehouse storage and handling operations, including supervisory personnel." Stillwell retained Daniel Barrett to act as general manager and vice president of HDS and it was contemplated that James McGee, another employee of Southwest, would be retained as Barrett's assistant in furnishing immediate supervision to employees at the newly acquired Spikewood location. On February 1, 1975, Re-

spondent commenced operation of the Spikewood warehouse, continuing immediately to honor its responsibilities for storage and service to customers of S.T.S.

In operating the Spikewood public warehouse, Respondent, like S.T.S., was responsible for the unloading of trucks, the storing of goods in their designated places, and, when stored goods were requested by customers, to locate and load goods on trucks for delivery. Respondent had no responsibility for the hauling of goods beyond the warehouse premises.

The Spikewood warehouse occupied some 250,000 sq. ft. The aforedescribed warehousing functions required employment of tow motor operators and laborers referred to as warehousemen. Stillwell decided that employees to be hired in connection with the new warehousing operation would be drawn from two basic sources. Thus, hiring would be from among the former employees of S.T.S., on the one hand, and applicants responding to a newspaper advertisement which appeared in the *Houston Chronicle* on Sunday February 2, 1975, on the other. The hiring was entrusted to General Manager Barrett of HDS.

Former employees of S.T.S. seeking work with Respondent were required to file applications beginning on the morning of February 3.

Barrett, with consent of Stillwell, retained Willie Jackson, the former warehouse manager of S.T.S., to act in a supervisory capacity as an assistant to James McGee. In addition, Barrett hired nine former employees of S.T.S.; namely, Roger Abbs, Warren Abbs, Lincoln Steber, Jesse Warren, Nathaniel Jones, Raymond Mills, Wilford Davis, Curtis Mack, and Clyde Davis. Barrett during the first week of February hired six additional employees who responded to the newspaper ad. This group consisted of Ronnie Barrett, Jerry Carter, Brett Griffin, Mike Rice, Robert Roy, and Mike Usher. Two additional employees, John Tinkle and James Willis, were in Southwest's employ at the Katy Freeway facility when Spikewood was acquired. Robert Stillwell, the son of Gary Stillwell, is also listed in Respondent's payroll records as having been employed on a regular part-time basis commencing during the week of February 3, 1975.

Eight former employees of S.T.S. were not hired by Barrett, and it is the General Counsel's contention that in each instance, Barrett acted on the basis of union-related considerations, thereby violating Section 8(a)(3) and (1) of the Act.

Also on February 3, 1975, Charles L. Brawley, Sr., Local 988's business agent, having been notified that the warehouse was under a new management, appeared at Spikewood. He conferred with Barrett, asking if Barrett knew that Local 988 represented the employees at the warehouse and that the collective-bargaining agreement covering them was not to expire for 9 months. Barrett replied that such matters were in the hands of lawyers, that he had no connection with the Union, and that as far as he was concerned the Union was out. By letter of that date, Brawley again informed Barrett of Local 988's majority status among the employees at S.T.S., requested that Barrett reconsider Respondent's failure to reemploy all former employees of S.T.S., and also invited contract discussions at Barrett's convenience.

On February 4, 1975, Local 988 filed the original unfair labor practice charge in this proceeding, alleging *inter alia* that HDS was a successor to S.T.S. and had failed and refused to bargain, and that HDS had discriminated by refusing to employ certain employees of S.T.S. because of

their union representation and activities on behalf of Local 988.

Thereafter by letter dated February 13, 1975, over signature of D. L. Barrett, Local 988 was informed as to the circumstances under which HDS acquired the Spikewood warehouse from S.T.S. and the relationship between HDS and Southwest. The letter went on to indicate that once the work force had stabilized, the employees would be free to determine whether or not they wanted a collective bargaining representative, and if they did want one, to determine just which union it would be. The letter also indicated that Respondent would decline to hire *all* former S.T.S. employees since such action would not be consistent with its interest determining who were "the best men" for the job.

Subsequently on March 4, 1975, Respondent discharged four employees who had formerly worked for S.T.S., and who had been hired by Respondent on February 3. Those discharges are claimed by the General Counsel to have violated Section 8(a)(3) and (1), as an extension of Respondent's unlawful effort to avoid dealing with Local 988.

B. The Refusal To Hire

1. In General

The complaint alleges that the former employees of S.T.S. listed below, were denied employment by Respondent, in violation of Section 8(a)(3):

Andrew Loring	Eugene Plater
Lawrence Buckner	Phillip Ware
R. B. Hammonds	Emmett Lewis
Nehemiah C. Alexander	Eddie Lee Armstrong

In this connection, as indicated, Respondent assumed control and operation of the warehouse on Saturday February 1. On February 3, a number of former employees

of S.T.S. went to the Spikewood warehouse. Dan Barrett and his assistant, James McGee were present on behalf of Respondent at that time. The S.T.S. employees were given employment applications, interviewed, and hired or denied employment by Dan Barrett.

Prior to February 3, Barrett consulted with Stillwell concerning the staffing of the Spikewood facility. He was given exclusive responsibility for hiring at Spikewood warehouse. According to Barrett, his instructions concerning the selection of individual employees was general in that he was simply to retain the people best qualified to perform all warehouse functions, so that those hired would be flexible enough to fit different jobs in the warehouse. It is the sense of Barrett's testimony that he received no instructions from Stillwell to hire any specific individuals.[4]

Barrett was the only witness available, through whom Respondent could explain the refusal to hire the alleged discriminatees. His explanations in each case and facts relative to an evaluation thereof are set forth as follows:

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[4] I discredit Stillwell's testimony that he in fact instructed Barrett to hire six former employees of S.T.S. (Roger Abbs, Warren Abbs, Lincoln Steber, Jesse Warren, Nathaniel Jones, and Raymond Mills). This portion of Stillwell's testimony is uncorroborated, and impressed me as a belated effort to neutralize certain contradictions in Barrett's explanation for his refusal on February 3 to hire certain alleged discriminatees. Examination of Barrett's testimony reveals no reference to any such instruction, and indeed the tenor of the evidence adduced from him suggests that the hiring of the six individuals was accomplished through exercise of Barrett's independent judgment. My disbelief of Stillwell is sufficiently strong in this respect, to arouse the general impression, when considered with other aspects of his testimony, and his general demeanor, that the entirety of his actions in connection with acquisition of the Spikewood warehouse are to be viewed with considerable mistrust.

Eugene Plater. Barrett testified that he refused to hire Plater because Plater's application did "not specifically indicate warehouse work" and because said application "indicated that he couldn't start work on the 4th," with Barrett further explaining that he needed people immediately. Plater's application explicity states his request for "any work", and further indicates that he was available to begin work on February 4, 1975. Contradicting this explanation for the refusal to hire Plater is the fact that Respondent hired Raymond Mills despite Mills' unavailability until February 4. In addition, the newspaper ad appearing in the Houston Chronicle on Sunday, February 2, simply listed a phone number, without indication where applications were to be filed in person or at what time. It is highly unlikely, that all those hired in response to that ad could have reported for work any earlier than Plater. In sum, Barrett's explanation for refusal to hire Plater was unpersuasive.

Lawrence Buckner. Barrett testified that that he did not hire Buckner because Buckner did not show up for an interview. Buckner was not called as a witness and in the circumstances, as Barrett's testimony stands uncontradicted it is credited.

Emmett Lewis. Barrett testified that he did not hire Emmett Lewis because the latter's application was incomplete and indicated that Lewis' experience was as a truckdriver. Emmett Lewis was apparently one of the former S.T.S. employees who prior to the fall of 1973 served as a truckdriver. However at that time, Lewis was reclassified and assigned to warehouse work. Barett admits to knowledge that on February 3, he knew that Lewis had been employed by S.T.S., and that S.T.S. had no truckdrivers. Although Barrett denied knowledge that S.T.S. had previously converted its truckdrivers and assigned them to

warehouse work, I discredit him in this respect. I find it difficult to believe that Barrett was unaware of S.T.S.'s action with respect to truckdrivers in 1973, and that those affected by this change remained employed by S.T.S. in the warehouse until the latter's cessation of operations on January 31, 1975. Barrett's reasons for refusing to hire Lewis would have been clarified and refuted through an interview and from other information at Barrett's disposal, and his assigned reasons for rejecting Lewis are unpersuasive.

Phillip Ware. Barrett claims he refused to hire Ware because Ware was unavailable for work on February 3 and because his application was "relatively incomplete insofar as his work experience was concerned." As in the case of Eugene Plater, I do not believe that Ware was denied employment because his application recited that he could start on February 4, 1975. My views concerning Plater are equally applicable to Ware in this regard. As for the assertion that Ware's application was incomplete as to his prior work experience, since his background would have been clarified through an interview, omissions on the application afford no reasonable explanation for Respondent's negative appraisal of Ware. In any event Ware's application was only slightly less informative than that of Wilford Davis, who was in fact hired by the Respondent.

Andrew Loring. Barrett testified that he refused to hire Loring because he applied for a position as a truckdriver. It is undisputed that Respondent employed no truckdrivers in any of its operations. On the application completed by Loring it is plain that the position he sought was that of a "truckdriver" and there is no indication on the record that he would have accepted any other job.

R. B. Hammonds. Barrett testified that he did not hire Hammonds because he applied for a position of "mechanic-truckdriver." Barrett also observed that Hammonds did not list his prior employment experience on his application, and that the application reveals that Hammonds had been injured on October 31, 1974. Hammonds confirmed that he had been injured while employed by S.T.S. and last worked on October 31, 1974. He relates that upon learning that S.T.S. was going out of business, he went to the warehouse and filled out an application on Tuesday, February 4. According to Hammonds, he was not then available for employment but later, on February 18, 1975, he received a medical release permitting him to work on a light duty basis. On that date Hammonds had a conversation with Barrett in which he asked if Respondent would hire him for *light* duty. Barrett indicated that he had Hammond's application and had not decided what to do with it. It does not appear that following said February 18 conversation, Hammonds made any further effort to obtain work with Respondent.

Eddie Lee Armstrong. At the outset of the hearing, the complaint was amended to add Eddie Lee Armstrong as among those discriminatorily denied employment by the Respondent. Barrett testified that he never received an application from Armstrong. According to Armstrong, he he went to the warehouse on Monday, February 3, accompanied by Business Agent Brawley, Alexander and Hammonds, where they met with Barrett.[5] According, to Armstrong following that meeting, he obtained an application from Nehemiah Alexander, filled it in, and turned it

[5] Business Agent Brawley does mention that Alexander and Hammonds, both of whom were stewards, accompanied him to the meeting with Barrett. His testimony does not acknowledge Armstrong's presence.

over to James McGee. According to Armstrong, this occurred in the presence of Willie Jackson, the former S.T.S. warehouse manager who was retained by Respondent. McGee could not recall having received an application from Armstrong. Jackson, on the other hand substantiated Armstrong, asserting that he observed Eddie Armstrong give his application to McGee and that he (Jackson) made a comment about it because there was a dirty smudge on one side. I did not believe Jackson and Armstrong. Jackson's testimony impressed me as tainted by an extreme bias towards Respondent, growing from circumstances surrounding his employment at Spikewood by Respondent, and his subsequent termination. He seemed too willing to relate in exaggerated form, whatever testimony would be necessary to prejudice the position of the Respondent. I also was not impressed with Armstrong's demeanor and regarded it as entirely improbable that Respondent, despite its apparent retention of all other relevant applications, would have either misplaced or deliberately withheld that of Armstrong. My suspicion as to Armstrong's claim is supported by the curiosity that arises from authorization cards solicited by Local 988 on February 3 and 4, 1975. Thus, the record includes some 20 signed authorization cards, all of which are dated on February 3 or 4, 1974 except that of Armstrong which is undated. Although on this basis it might be speculative to assume that Armstrong was not present when the others signed cards, the suspicion raised is consistent with the unimpressive testimony in support of his claim. I find that Armstrong did not in fact file an application at any time on or after February 3, 1975.

Nehemiah Alexander. Barrett was not examined as to the reason for the failure to hire Alexander. The application of Alexander recites that "I am injured now" and also indicates that he was unable to work. Alexander did not testify.

2. Concluding Findings

The General Counsel contends that Respondent staffed the expanding warehousing operation so as to evade any obligation to bargain with Local 988, by setting a limit on the number of former S.T.S. employees hired, thereby precluding this latter group from constituting a majority of its overall work force. It is claimed that the Respondent acted upon such an intent in declining to hire Hammonds, Plater, Alexander, Loring, Buckner, Ware, Lewis and Armstrong, thereby violating Section 8(a)(3) and (1) of the Act in their respective cases.[6]

Respondent, in defense, claims that all applicants for employment at Southwest were judged by the same standard, with the failure to hire the alleged discriminatees reflecting no more than equal application of this standard. Respondent denies that union animus or discrimination was involved.

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[6] I find no merit in the Charging Party's theory that Respondent denied employment to these eight individuals because they "were employees that had been the subject of a hotly disputed grievance and impartial arbitration." The grievance in question related to the unilateral termination by S.T.S. of its trucking operation, by an attempted conversion of certain drivers to independent contractors and reclassification of others to jobs in the warehouse. Contrary to the Charging Party's factual premise, it does not appear that the eight alleged discriminatees in question here were party to or beneficiaries of that proceeding. Documented evidence reflects that only five of that group were reclassified by S.T.S. in 1973. Specifically named in the grievance-arbitration proceeding and covered by the award which subsequently issued were Hammonds, Plater, Alexander, Armstrong and Ware. There is no evidence that Loring, Buckner or Lewis were involved. Even assuming that Stillwell had knowledge of the pending arbitration against S.T.S. on behalf of the former truckdrivers, I am not convinced that the record supports an inference that Respondent's refusal to hire employees related specifically to their involvement in the pending arbitration proceeding against S.T.S.

Contrary to the Respondent, with respect to alleged discriminatees who completed applications and were available for work during the week of February 3, a reasonable inference is warranted that they were denied employment as part of Respondent's effort to avoid the consequences of the Board's successorship doctrine. Thus, Barrett testified that he sought to hire the most qualified men, who could perform all warehousing functions, including fork-lift operation, checking, and loading so as to permit their flexible utilization throughout the operation. Barrett stressed the need to hire immediately in order to provide continuous service to customers and to commence reorganization of the warehouse which at the time of acquisition was in a state of disarray. He claims to have had no knowledge of the competence or incompetence of former employees of S.T.S., and despite the immediate need for employees, and the recognition that some of the employees would come from this source, he made no effort to consult with former officials of S.T.S., or S.T.S. former Warehouse Manager, Willie Jackson,[7] concerning the former employees of S.T.S. Also of interest is the fact that Barrett's testimony indicates that he could hire all or none of the former S.T.S. employees. Yet, despite this, Stillwell assumed that, though fewer employees would be needed by Respondent than employed by S.T.S., Respondent would *not* be able to fill its entire need from that source. Thus, it

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[7] I discredit Barrett's testimony that he discussed the experience of all S.T.S. employees with Jackson prior to February 3. This phase of Barrett's testimony is frought with contradiction. Previously Barrett had indicated that he had no background on S.T.S. people until he received their applications. Subsequently, Barrett indicated that he had no knowledge prior to receipt of the applications and interviews that S.T.S.' former truckdrivers had been working as warehousemen. Although Jackson was not the most persuasive witness, in the face of the contradictions in Barrett's account, I credit Jackson's denial that he was consulted with respect to the competence of S.T.S. employees.

was pursuant to Stillwell's instruction, that the ad appeared in the *Houston Chronicle* on Sunday February 2, the day before applications were received from S.T.S. employees.[8] It is curious, at the least, that this step was taken, even though neither Barrett nor Stillwell had knowledge that among the S.T.S. work force there were specific individuals that would not qualify for employment with Respondent.[9]

Furthermore following completion of the hiring, and apparently in response to the unfair labor practice charge previously filed by Local 988, by letter dated April 28, 1975, addressed to Mr. Clayton Corley of the National Labor Relations Board, Respondent listed employees on its payroll for the week ending February 7, 1975. The list named eighteen employees, nine of whom formerly worked for S.T.S.[10] Thus, Respondent, numerically, had hired exactly 50% and less than a majority of its expanded work force from among the former employees of S.T.S.

In an earlier letter, dated February 13, 1975, also to the NLRB in response to the charge filed in Case No. 23-CA-5448, Respondent, in support of its refusal to bargin with Local 988, states as follows:

> 2. Regarding the alleged failure of HDS to bargain collectively, Southwest (the actual employer) has no knowledge of the existence of a person or entity representing a majority of its employees or a desire on the part of its employees to bargain collectively or to be represented by any third party. The prior representative status of Teamsters Local No. 988 regarding the STS employee unit is not relevant to the situation regarding the Southwest employees in light of the fact that less than half of the Southwest employees were formerly employed by STS, and that Southwest hired less than half of the employees constituting the former STS employee unit. The majority of Southwest's present work force has no known history of union affiliation or collective bargaining representation, and their presence in the work force destroys whatever union majority may have existed in the STS employee unit prior to the sale. Southwest is not obligated to bargain with a representative of less than a majority of its employees.

[8] The ad recited as follows:
FORKLIFT DRIVERS & WAREHOUSEMEN: immediate openings, experience preferred, good starting salary. Contact Mr. Barrett, 675-9235.

[9] James McGee, Barrett's assistant at Spikewood testified that he and Barrett, prior to the takeover discussed staffing, and admits that based on these discussions he assumed that Respondent would retain practically the entire work force of S.T.S.

[10] "James Willis" apparently through inadvertence was listed twice.

In agreement with the General Counsel I find that it was not mere coincidence which lay behind Respondent's hiring of less than a majority of former S.T.S. employees. Instead, I am convinced that this was a by product of a calculated scheme to avoid any obligation to bargain with the Union.

The former employees of S.T.S. provided a willing and available source of manpower, which could serve Respondent's immediate need for qualified warehousemen with little adjustment and training. Yet, without investigating the individual abilities of this source of workers, Respondent elected to advertise for workers in a local newspaper,[11] and denied employment to S.T.S. workers, at the same

[11] S.T.S. operated the Spikewood warehouse with some twenty-five employees. In conversations prior to the takeover, Stillwell claims to have suggested to Barrett that the new warehouse could probably be run with twelve employees. Barrett however was given discretion to hire any number of individuals as he felt necessary. No plausible explanation exists for Stillwell's instruction that a newspaper ad be placed, when, according to Stillwell's own opinion, retention of only half of the S.T.S. complement would be adequate to fill Respondent's manpower needs at the facility.

time as it could not be certain as to the results that ad would bring, in terms of the quality of experience and capabilities of those who would respond.[12]

Also relevant to the assessment of motivation is the incredible nature of Stillwell's attempt to explain Barrett's hiring of six former S.T.S. employees. This unbelievable shift in testimony impressed me as a further effort to mask Respondent's predesign to hire only so many of S.T.S. employees as would be permitted without risking a bargaining relationship with Local 988.

The inconsistencies in Barrett's testimony, the predisposition to avoid hiring exclusively from among S.T.S. personnel, together with the unpersuasive explanations given by Barrett for his refusal to hire Eugene Plater, Emmett Lewis and Phillip Ware, strongly suggest that Barrett's refusal to act affirmatively in their cases was pursuant to interests other than Respondent's immediate need for an experienced work force. These individuals were available for work no later than Tuesday February 4, and had indicated a desire for any work which Respondent could make available to them. Though all three had been employed at certain periods by S.T.S. as truckdrivers, I am convinced that Barrett knew that S.T.S. had no truckdrivers in its employ and that they had been working as warehousemen. Their rejection, without inquiry of S.T.S. officials concern-

[12] Barrett concedes that four applicants, who were hired after responding to the ad were college students with no prior experience in warehousing. Barrett's testimony that he hired them because he thought they would be helpful in the physical inventory of the warehouse struck me as a belated rationalization for the clear departure from the hiring standards described in his prior testimony.

ing their suitability for employment with Respondent[13] was not compatible with an objective approach to hiring pursuant to uniform standards. In the circumstances the conclusion is inescapable that these individuals were denied employment because of a predesign on Respondent's part to decline to hire former S.T.S. employees beyond a number constituting a majority of its work force. Accordingly as Respondent's action in this regard was designed to avoid bargaining with the Union, I find that Respondent thereby violated Section 8(a)(3) and (1) of the Act.

It does not follow, however, that this discriminatory motivation extends to all discriminatees named in the complaint. Despite its illicit scheme, Respondent had no obligation to hire those seeking specific jobs unavailable in Respondent's operation, or those who failed to file an application, or those who were unfit for immediate employment. Major elements supporting the inference of unlawful discrimination in the cases of Plater, Lewis, and Ware, were Respondent's immediate need for experienced personnel to maintain the continuity of public warehouse services, their apparent satisfaction of Respondent's needs, and the unbelievable reasons advanced by Barrett in denying them jobs.[14] As for the remaining former employees of

[13] Testimony offered by Respondent through Richard A. Brown, apparently an expert in warehouse management and an executive vice president of J. Weingarten, and Stillwell, which related to their alleged observation of laxity on the part of alleged S.T.S. employees during their visits to Spikewood prior to February 1, 1975, favors, rather than detracts from the inference urged by the General Counsel. Neither Brown nor Stillwell could identify the individual employees who were the subject of their charges, and this testimony, if true, enforces the suspicion generated by Respondent's failure to investigate the individual S.T.S. employees, and determining who the lagards were, before engaging in a hiring procedure which was unlikely to expose any offenders.

[14] See e.g. *Universal Fuel, Inc.*, 204 NLRB 26, 28.

S.T.S., whom the complaint alleges to have been unlawfully denied employment, the record does not support a finding that they would have been hired even if union activity were not a consideration in Respondent's hiring process. Thus, based on the credibility finding made above, Eddie Armstrong did not file an application.[15] Buckner failed to show up for an interview, and Hammonds and Alexander as of February 3 were injured and unable to work, and it does not appear that, at any time following full recovery, they renewed their effort to obtain employment with Respondent. Loring insofar as can be determined from the record, applied solely for a position as "truckdriver," a job not available in Respondent's operation.

In these circumstances I find that Buckner, Armstrong, Hammonds, Alexander, and Loring, were not employed by Respondent on or after February 3, 1975, because of reasons unrelated to Respondent's unlawful design to restrict hiring of former S.T.S. employees, and accordingly, I shall recommend dismissal of the 8(a)(3) and (1) allegations in their respective cases.

C. The Successorship Issue And Respondent's Alleged Refusal to Bargain

On February 1, 1975, S.T.S. and Local 988 were parties to a collective-bargaining agreement, not scheduled to expire until November 1, 1975. S.T.S., in addition to the Spikewood warehouse, was also engaged in the transportation business. The unit covered by its contract with Local 988 consisted of truckdrivers, mechanics, tow motor operators and warehousemen. It will be recalled, however, that the S.T.S. transport operation since September 1973, was conducted through independent contractors, with no employees classified as such on its payroll thereafter. The elimination of truckdrivers from employ of S.T.S. was protested and submitted to arbitration by Local 988, with an award rendered well after the February 1 takeover of Spikewood by Respondent. Respondent at no time employed truckdrivers.

[15] There is no merit in the General Counsel's alternate contention that under *NLRB* v. *Southern Greyhound Lines*, 426 F 2d 1299 (CA 5), and *J.R. Sousa & Sons*, 210 NLRB 982, 8(a)(3) and (1) ought be found as to Armstrong notwithstanding his failure to file an application. Unlike the cited cases, here Respondent's unlawful pattern of conduct did not include acts which overtly reduced the filing of an application to a ritualistic act of futility. Armstrong's failure to file an application is more expressive of a disinterest in employment than a coerced inaction, and one cannot assume that he would not have been among the nine S.T.S. employees hired by Respondent even if an application had been filed.

Upon acquisition of the Spikewood warehouse, Respondent operated a warehouse of its own, known as the Katy Freeway Warehouse. Unlike the Spikewood facility, which primarily housed raw industrial products, the Katy warehouse handled finished goods and apliances.

Respondent had operated the Katy Warehouse with three employees, John Tinkle, James Willis and James McGee. Tinkle and Willis represented the entire rank and file employe complement, having an employment history with Respondent as of February 1, 1975. During the first week of February 1975, Respondent hired nine former employees of S.T.S. In adition Respondent from outside sources hired Ronald Barrett, Jerry Carter, Brett Griffin, Mike Rice, Robert Roy, Mike Usher, and Rob Stillwell.

Immediate supervision of the Spikewood warehouse was reposed in Daniel Barrett, who was assisted by James McGee. Willie Jackson, the S.T.S. warehouse manager, was

retained by Respondent in a supervisory capacity to assist in the Spikewood operation.[16]

Even discounting the three employees found to have been discriminatorily denied hire by Respondent,[17] former S.T.S. employees retained by the latter constituted a majority of the entire work force in Respondent's employ during the first week of February 1975, exclusive of those whom the Board under a established policy would deem ineligible to express themselves with respect to any question concerning representation under the Act. Thus, in considering the degree to which Respondent retained formerly represented employees from S.T.S., in relation to the balance of its rank and file work force, no consideration is to be ggiven to the employment of James McGee, who at all times after February 1 served in a supervisory capacity; or to Rob Stillwell, the son of Gary Stillwell.[18] Thus, of the seventeen rank and file employees who were on Respondent's payroll during the first week in February 1975 and who were eligible to express themselves with respect to any question of representation, nine were formerly

[16] A change in supervision by the purchaser does not negate the existence of a duty to bargain under the successorship doctrine. *Hecker Machine, Inc.*, 198 NLRB 1114, 1118.

[17] In determining whether a duty to bargain exists under the Board's "successorship doctrine," former employees of the prior owner who were discriminatorily denied employment by the purchaser, are considered to be employees of the latter. *Greengate Mall, Inc*, 209 NLRB 37.

[18] Gary Stillwell owns 100% (percent) of the outstanding stock in Southwest, which, in turn, is the sole owner of HDS. Section 2(3) of the Act specifically excludes from the status of "employee," any individual employed by a parent or spouse." Consistent therewith, the Board in *Cerni Motor Sales Inc.*, 201 NLRB 918, held that children of shareholders in a corporation having a 50% or greater ownership interest in a closely held corporation are not regarded as employees within the meaning of the Act. Accordingly Rob Stillwell is not an employee within the meaning of the Act.

employed by S.T.S. at the Spikewood warehouse. The number employed by S.T.S. at Spikewood prior to February 1, 1975 does not appear in the record as a concrete figure. Willie Jackson testified that it was approximately twenty-five employees. In addition to those actually retained by Respondent, three others were discriminatorily denied employment, and, hence, by virtue of Respondent's unlawful refusal to hire them, "they were by operation of law its employees."[19]

Respondent contends that a unit limited to employees at the Spikewood warehouse would be inappropriate, inasmuch as employees formerly employed by Respondent, former employees of S.T.S. and those newly hired from other sources were integrated into a single warehouse operation consisting of the Spikewood and Katy Freeway warehouses, and those subsequently acquired and operated by Respondent. In support the record establishes that, upon acquisition of the S.T.S. facility, all employees hired by Respondent were expected to provide the full range of warehouse skills, and were subject to assignment to any of Respondent's facilities. Indeed, of the employees hired during the week of February 3, 1975, the critical period for determining Respondent's obligation to bargain,[20] four

[19] See *J.R. Sousa & Sons*, 210 NLRB 982, 984. Former S.T.S. employees hired by Respondent are not clearly shown to be a majority of those previously employed by S.T.S. However, this factor, when attributed to a diminution in the size of the work force by the new owner, has been held not to preclude a successorship finding. See e.g. *Band-Age, Inc.*, 217 NLRB No. 71, JD p. 5-6.

[20] Contrary to Respondent's contention, a successorship determination, in circumstances, where new ownership occurs without break in the continuity of operations, must rest upon events occurring contemporaneous with the takeover. The "successorship doctrine" is concerned with whether or not employees are entitled to continuing representation by an exclusive bargaining representative. The inquiry, being concerned with a purchaser's

(Steber, Mack, Mills and Jerry Carter) were immediately assigned to the Katy warehouse. The pattern of integration effected by Respondent in this respect is enforced by testimony of Mack that he worked at three different locations, and by Mills that he worked at two different locations during their respective 1-month tenures with Respondent. It also appears that John Tinkle and Brett Griffin worked in five and four different locations, respectively. In the circumstances of this case, however, while noting that Respondent's various acts of discrimination might raise some suspicion as to the genuine nature of the interchange, I find on balance that Respondent by its own action, upon acquisition of the Spikewood facility, merged that operation with the existing Katy warehouse under circumstances resulting in an accretion of the latter with the former. Furthermore as in *Spruce Up Corporation*[21] the integration of the Katy Freeway facility ". . . did not destroy the appropriateness of the . . . [historic] . . . bargaining unit and constituted only an expansion of the bargaining unit . . ."[22] Accordingly, I find that, on and after February 3, 1975, the appropriate bargaining unit herein consisted of:

> All warehousemen and tow motor operators employed at warehouses in Houston, Texas managed by corporations owned and controlled by Gary Stillwell, excluding office clericals, guards, watchmen and supervisors within the meaning of the Act.

immediate obligation to bargain, is not subject to influence through subsequent events. It is true that a question concerning representation or a legitimate withdrawal of recognition may derive from later events, if in fact the employer is thereby accorded objective considerations furnishing a reasonably based doubt of majority. See e.g. *Roman Catholic Diocese of Brooklyn*, et al. On the other hand, no such defense is available here, and, Respondent's reliance upon subsequent variations in the size and scope of its work force is deemed immaterial to the successorship issue.

[21] 209 NLRB 194.

[22] *Ibid* p. 196.

On the facts presented here, I find that Respondent was obligated to recognize and bargain with the Union under the Board's "successorship doctrine." Thus, under established Board policy, where a bargaining representative has been selected by employees to deal with their employer, a continuing obligation to deal with that representative is not subject to defeasance solely on the basis of a change in ownership. As the Board has stated:

> The duty of an employer who has taken over an industry to honor the employees' choice of a bargaining agent is not one that derives from private contract, nor is it one that necessarily turns upon the acquisition of assets or other arrangement between employers. It is a public obligation arising by operation of the Act. The critical question is not whether Respondent succeeded to the [predecessor's] corporate identity or physical assets, but whether Respondent continued essentially the same operation, with substantially the same employee unit whose duly certified bargaining representative was entitled to statutory recognition at the time Respondent took over.[23]

In the instant case, both before and after Respondent's acquisition of the Spikewood warehouse, it was a public warehouse facility in which various industrial products were stored. Respondent assumed control thereof, without hiatus and as a going concern, and continued to service exactly the same customers and to handle exactly the same products as S.T.S. Former employees of S.T.S. constituted an immediate majority of Respondent's work force. In consequence of the takeover no change occurred in the overall manpower skills necessary to operation of the warehouse. Like S.T.S., Respondent was responsible for the unloading of trucks, the storage of materials in their designated places, and when delivery was requested by

[23] *Maintenance, Inc.*, 148 NLRB 1299, 1301.

customers, to locate the material and to load it on trucks for delivery. Although Respondent's management techniques and approach to the running of the warehouse differred from that of S.T.S., the changes were of the type normally associated with a change of ownership and failed significantly to reflect any break in the continuity of the employing enterprise. In these circumstances, I find that the change in ownership was not accompanied by circumstances permitting a reasonable assumption ". . . that, as a result of transitional changes, the employees' desire[s] concerning unionization have likely changed."[24] Accordingly, I find that Respondent by failing to recognize and bargain with the Union upon request, violated Section 8(a)(5) and (1) of the Act.[25]

D. The Alleged Discriminatory Discharges

On March 4, 1975, Respondent terminated Wilford Davis, Curtis Mack, Raymond Mills, and Nathaniel Jones, all former employees of S.T.S. The discharges occurred on a

[24] See *Ranchway Inc.*, 183 NLRB 768, 1169.

[25] In the alternative, even if the change in ownership was accompanied by radical changes in operation, sufficient to preclude application of the successorship doctrine, the 8(a)(5) and (1) violation found herein would nonetheless be justified under *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), as that decision was construed by the Board in *Trading Port, Inc.*, 219 NLRB No. 76. Thus, as of February 4, 1975 the Union held valid authorization cards signed by nine of Respondent's seven employees. In addition, cards were executed by Plater, Lewis, and Ware, each of whom, has heretofore been found to have been discriminatorily denied employment by Respondent in violation of Section 8(a)(3) and (1) of the Act. By virtue of said discrimination, and Respondent's subsequent discriminatory discharge of four additional employees of S.T.S. on March 4, as shall be found *infra*, the pervasive nature of Respondent's unlawful efforts to avoid dealing with the Local 988, preclude a fair election and hence a bargaining order would be warranted to best protect the employees' rights.

Tuesday, in the middle of Respondent's payroll period. The record fails to disclose that any of the dischargees engaged in specific work derelictions or acts of misconduct at a time proximate to their terminations, which could be taken as having triggered the action taken against them. On the other hand, the terminations occurred after Respondent learned that a union meeting was to be held that same week.

By way of defense, it is argued that Respondent had no knowledge that all four of the dischargees intended to attend the union meeting, and, further, that all four were discharged for cause in that they simply did not fit Respondent's "concept of the type of employees it desired to hire from the beginning."

It appears that during the first week of March, a union meeting had been planned with an NLRB field representative, apparently as part of the investigation of the then pending unfair labor practice charges against Respondent. Of the discharges, there is no evidence that Respondent had any knowledge or reasonable basis for belief that Wilford Davis or Curtis Mack intended to attend. Raymond Mills credibly testified that prior to the meeting, he told McGee that he could not work on that day because he had business to attend to. Nathaniel Jones, testified, that pursuant to a request of R. B. Hammonds, a union steward, he informed other employees that the meeting had been scheduled. Jones denied that he spoke to any representative of management concerning the meeting. Daniel Barrett, on direct examination, testified that he did not learn of the union meeting until after the decision was made to terminate the men. McGee testified on direct examination, that he did not inform Barrett that employees were going to attend a union meeting until after the decision was made to affect the discharges. On cross examination, however,

when confronted with a pretrial statement given to co-counsel for the Respondent, Barrett admitted that he learned of the union meeting on or about February 26, 1975, well prior to the decision to discharge the men. A similar statement given by McGee recites as follows "On February 26 or 27, I was told of the union meeting to be held on March 4, 1975, by several employees including Mills, and was told that certain employees could not work past 4:30 that day." McGee, on cross examination admitted that shortly after learning of the union meeting, he informed Barrett to that effect. McGee admits that he knew that Mills and Jones wished to attend the union meeting.[26] The evasive and contradicting nature of Respondent's testimony in this respect, lends support to the inference of discrimination sought by the General Counsel.

Respondent's claim that Mills, Jones, and Davis, were discharged for cause rests upon the testimony of Daniel Barrett, James McGee, and Roger Stillwell. The job performance of Curtis Mack, who apparently worked very little at the Spikewood facility after his hire, and hence was not within the supervisory authority of Barrett and McGee, was described on behalf of Respondent by John Tinkle.[27] The testimony offered in this respect variously portrays the dischargees as unwilling to respond to orders, slow and unable to perform the duties for which they were hired. On Respondent's own evidence, it appears that these inadequacies were detected shortly after the hire of the dischargees.

However, the continuing dissatisfaction with respect to the performance of Davis, Mack, Mills, and Jones apparently was not considered as sufficiently serious to warrant their termination on an earlier date. The suspicion aroused by the delay in effecting the discharges, is enforced by the fact that Respondent did not tolerate inadequate performance of all employees hired during the week of February 3, 1975, as it did in the case of the dischargees. Thus, during the month of February, four other individuals at various times were discharged for cause including former S.T.S. warehouse manager, Willie Jackson.

Nonetheless, to explain the timing of the discharges, Stillwell testified, with some corroboration from McGee and Barrett, that a meeting was held on March 3, attended by Stillwell, Barrett, McGee. Said meeting was initiated by Stillwell because of his concern with the continuing nature of problems in the warehouse. Stillwell questioned Barrett and McGee as to why they were still tolerating certain work inefficiencies, informing them that they were reaching a 30-day period and had made no substantial improvement in cleaning up the Spikewood operation. Stillwell claims to have indicated his displeasure with the inability of Barrett and McGee to clean up the Spikewood operation and to have instructed McGee and Barrett that they either get rid of their unproductive personnel or he would get rid of them.

Respondent's testimony both as to the timing of the discharges and as to the grounds therefore impressed me as unworthy of belief. Running throughout Respondent's evidentiary case was a tendency on the part of its witnesses to diminish the significance of union activity as a motivating factor behind various actions by the Respondent in this case. McGee and Barrett were forced into serious contradiction when confronted with pretrial statements concerning the acquisition and communication of knowledge of the union meeting in advance of the discharges. I suspected firmly that other efforts to suppress Respondent's concern

[26] McGee denied reporting the union meeting to Stillwell. Stillwell testified that at the end of February, McGee told him of a need to attend a union meeting.

[27] John Tinkle was employed by Respondent prior to its acquisition of the Spikewood warehouse.

for Local 988's history of representation were equally without support in fact. I have heretofore discussed the dubious veracity of Stillwell, who I regarded as a thoroughly incredible witness.

In contrast to the testimony offered by Respondent, I believe that all four terminations were prompted by considerations evident from the credited testimony of Raymond Mills and Nathaniel Jones, that Barrett in discharging them stated that they were being terminated because *they* were not satisfied with their working conditions,[28] an obvious reference by Barrett to his awareness of their continuing support of Local 988.

Considering the entire record, including Respondent's discriminatory refusal to hire three former S.T.S employees in the first week of February 1975, the sudden and precipitant action in discharging Mills, Jones, Mack, and Davis in the middle of a pay period and shortly after acquiring knowledge that a union meeting was to be held, and Barrett's implied reference to the continuing interest of Jones and Mills in represntation by Local 988 during their terminal interviews, I find that Respondent acted against all four as a further step in its effort to thwart the threat of union organization of its warehouse facilities. Though mindful that Respondent had no knowledge that Mack and Davis intended to go to the union meeting, I am convinced that they were included in the group discharge, either to lend a semblance of legitimacy to Respondent's action, or in further attempt to reduce the influence within

[28] Barrett did not specifically deny making such a statement. Although McGee claimed to be present at the terminal interview of Jones and Mills and testified that he could not recall Barrett having made such a statement, McGee was a totally unreliable witness and is discredited. I do not regard the statement imputed to Barrett by Mills and Jones to be a product of their imagination and they are credited.

its work force of former S.T.S. employees. Accordingly I find that Respondent by discharging these four individuals on March 4, 1975 further violated Section 8(a)(3) and (1) of the Act.

Conclusions Of Law

1. Houston Distribution Services, Inc., and Southwest Warehouse Services, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Freight, Tank Line & Automobile Industry Employees Local Union No. 988 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by on February 3, 1975 refusing to hire Eugene Plater, Emmett Lewis, and Phillip Ware, in order to avoid bargaining with the Union, thereby discriminating against employees in a manner which would discourage union membership.

4. Respondent violated Section 8(a)(3) and (1) of the Act by on March 4, 1975 discharging Clifford Davis, Curtis Mack, Raymond Mills, and Nathaniel Jones, in a further effort to avoid bargaining with the Union thereby discriminating against employees in a manner discouraging membership in a labor organization.

5. Respondent violated Section 8(a)(5) and (1) of the Act, on and after February 3, 1975, by refusing to recognize and bargain with the Union, upon request, as the duly designated representative of a majority of its employees in an appropriate unit. The appropriate bargaining unit, as found above, consists of:

All warehousemen and tow motor operators employed at warehouses in Houston, Texas, managed by corporations owned and controlled by Gary Stillwell, excluding office clerical employees, guards, watchmen, and supervisors within the meaning of the Act.

6. The unfair labor practices found herein effect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist from engaging in such conduct, and take certain affirmative action designed to effectuate the policies of the Act. Furthermore, as the unfair labor practices committed by the Respondent are of a character striking at the core of employee rights safeguarded by the Act, I will recommend that it cease and desist from "in other manner" infringing upon the rights guaranteed employees through Section 7 of the Act.

It has been found that Respondent, in violation of Section 8(a)(3) and (1) of the Act unlawfully refused to hire Phillip Ware, Emmett Lewis, and Eugene Plater in violation of Section 8(a)(3) and (1) of the Act, and unlawfully discharged Clifford Davis, Curtis Mack, Raymond Mills and Nathaniel Jones. In the case of those denied employment, it shall be recommended that Respondent offer them immediate employment, discharging if necessary any employee hired after February 3, 1975 from sources other than S.T.S. As for the discharged employees, it will be recommended that Respondent offer them immediate reinstatement to their former positions, or if not available, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges. Respondent shall make whole all of said discriminatees for any loss

of pay resulting from the discrimination against them by payment of a sum of money equal to the amount they normally would have earned as wages from the date of the discrimination against them to the date they are either offered initial employment or reinstated by Respondent, as appropriate. Backpay shall be reduced by net interim earnings, and shall be computed on a quarterly basis in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289, and shall include interest at 6 percent per annum as provided in *Isis Plumbing & Heating Company*, 138 NLRB 716.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by refusing, upon request, to recognize and bargain with Local 988 as the exclusive representative of its employees in the appropriate unit defined above, I shall further recommend that Respondent cease and desist therefrom, and, upon request, bargain collectively with Local 988 as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

Upon the basis of the foregoing finding of fact, conclusions of law and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[29]

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[29] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, Houston Distribution Services, Inc., and Southwest Warehouse Services, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

a. Discouraging activity on behalf of a labor organization by refusing to hire, discharging, or in any other manner discriminating against an employee in order to avoid bargaining with a labor organization.

b. Refusing to bargain collectively concerning rates of pay, wages, hours and other terms and conditions of employment with Teamsters Freight, Tank Line & Automobile Industry Employees, Local Union No. 988 as the exclusive bargaining representative of its employees in the following appropriate unit:

> All warehousemen and tow motor operators employed at warehouses in Houston, Texas, managed by corporations owned and controlled by Gary Stillwell, excluding office clerical employees, guards, watchmen, and supervisors within the meaning of the Act.

c. In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

a. Upon request, bargain with the above named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

b. Offer to Phillip Ware, Eugene Plater, Emmett Lewis, immediate employment, discharging if necessary employees hired after February 3, 1975, from sources other than S.T.S., without prejudice to their seniority or other rights and privileges, and offer immediate reinstatement to Clifford Davis, Curtis Mack, Raymond Mills, and Nathaniel Jones, to their former positions, and if not available, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges, and make the aforesaid individuals whole for any loss of earnings they may have suffered as a result of the unlawful action against them in the manner set forth in the section of this Decision entitled "The Remedy."

c. Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

d. Post at its places of business located in Houston, Texas, copies of the attached notice marked "Appendix."[30] Copies of said notice on forms provided by the Regional Director for Region 23 after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted.

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[30] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Reasonable steps shall be taken by Respondent to assure that said notice is not altered, defaced, or covered by any other material.

e. Notify the Regional Director for Region 23 in writing, within 20 days from the date of receipt of this Decision, what steps have been taken to comply herewith.

Dated Washington, D.C.
May 27, 1976

Joel A. Harmatz
Administrative Law Judge

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

After a trial in which all parties were represented by their attorneys and afforded the opportunity to present evidence in support of their respective positions, it has been found that we have violated the National Labor Relations act in certain respects, and we have been ordered to post this notice and to carry out its terms. The National Labor Relations Act gives you, as employees, certain rights, including the right:

To engage in self organization;

To form, join, or help a union;

To bargain collectively through a representative of your own choosing;

To act together for collective bargaining or other mutual aid or protection; or

To refrain from any and all of these things.

Accordingly, we give you these assurances.

WE WILL NOT discourage membership in TEAMSTERS FREIGHT, TANK LINE & AUTOMOBILE INDUSTRY EMPLOYEES LOCAL NO. 988, or any other labor organization, by refusing to hire, discharging or in any other manner discriminating against employees in order to avoid dealing with that Union or any other labor organization.

WE WILL NOT refuse to bargain with TEAMSTERS FREIGHT, TANK LINE & AUTOMOBILE INDUSTRY EMPLOYEES LOCAL UNION NO. 988 as the exclusive bargaining representative of our employees in the following unit:

> All warehousemen and tow motor operators employed at warehouses in Houston, Texas, managed by corporations owned and controlled by Gary Stillwell, excluding office clerical employees, guards, watchmen, and supervisors within the meaning of the Act.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL offer immediate employment to Phillip Ware, Eugene Plater, and Emmett Lewis, and make them whole for any loss of pay suffered by reason of our discrimination against them as provided in the Decision of the Administrative Law Judge.

WE WILL offer Clifford Davis, Curtis Mack, Raymond Mills, and Nathaniel Jones, immediate reinstatment to their former positions, without loss of seniority and other privileges, and make them whole for any loss of pay sustained by them as a result of our discrimination, as provided in the Decision of the Administrative Law Judge.

WE WILL, upon request, bargain collectively and in good faith with TEAMSTERS FREIGHT, TANK LINE & AUTOMOBILE INDUSTRY EMPLOYEES LOCAL UNION NO. 988 as the exclusive representative of the employees in the above appropriate unit, and embody in a signed agreement, any understanding reached.

HOUSTON DISTRIBUTION SERVICES, INC.
AND SOUTHWEST WAREHOUSE SERVICE
(Employer)

Dated .....

By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, One Allen Center, 500 Dallas Avenue, Suite 920, Houston, Texas 77002 Telephone (713) 226-4722.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 23-CA-5448 and 23-CA-5497

HOUSTON DISTRIBUTION SERVICES, INC.
AND SOUTHWEST WAREHOUSE SERVICE
TEAMSTERS FREIGHT, TANK LINE &
AUTOMOBILE INDUSTRY EMPLOYEES
LOCAL UNION NO. 988

DECISION AND ORDER

On May 27, 1976, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions with a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the

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[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Houston Distribution Services, Inc. and Southwest Warehouse Service, Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. January 12, 1977

.....

John A. Penello, Member

.....

Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER JENKINS, concurring in part and dissenting in part:

I am in agreement with many of the findings made by my colleagues. Like my colleagues, I find that after Respondent acquired the Spikewood warehouse from S.T.S., it embarked upon an illicit scheme designed to insure that less than a majority of its work force would be composed of former S.T.S. employees and that the purpose of this scheme was to avoid the implications of the Board's successorship doctrine and the obligation to recognize and bargain with the Union. I also agree with their findings that Respondent discriminatorily refused to hire former S.T.S. employees Plater, Lewis, and Ware in furtherance of this unlawful scheme; that Respondent became the legal successor to S.T.S. and, as such, was obligated to recognize and bargain with the representative of the predecessor's employees; and that, thereafter, Respondent unlawfully discharged employees Davis, Mack, Mills, and Jones as part of a continuing effort to thwart union organization among its employees. Where my colleagues and I differ is over the reasons behind Respondent's failure to hire five other former S.T.S. employees. The majority is of the view that in the case of each of these individuals the record evidence will not support a finding that they would have been hired, but for Respondent's discriminatory practice. I disagree and would find that they were denied employment as a result of Respondent's unlawful scheme, just as it is the case with former S.T.S. employees Plater, Lewis, and Ware.

Briefly, the facts show that after actually taking over the operation of Spikewood facility Respondent evidenced its intention to select its work force immediately. At the time, Respondent realized that it would need fewer employees than the number employed by S.T.S. and Respondent's general manager, Barrett, was instructed by his superior to retain those S.T.S. employees who were the best qualified to perform all the warehouse functions. Barrett had the means at his disposal to carry out this

[2] We agree with the Administrative Law Judge's finding that there is ample evidence in the record to support a finding of unlawful discrimination in the cases of Plater, Lewis, and Ware. As to the remaining alleged discriminatees, the record discloses that they either failed to file an application, sought specific jobs unavailable at Respondent's facility, failed to show up for the employment interview, or were unfit for immediate employment. Contrary to Member Jenkins, we would not, in these circumstances, find that a failure to hire these employees was discriminatorily motivated.

instruction. Available to him were the personnel folders for all of the S.T.S. employees and the advice and counsel of Willie Jackson, who had served as the warehouse manager for S.T.S. and had been retained in a supervisory capacity by Respondent. Barrett candidly admitted, however, that he had no knowledge of the competence or incompetence of the S.T.S. employees and Respondent does not claim that its failure to hire certain of the S.T.S. employees was in any instance based upon their work performance record.

Whether or not Respondent initially intended to fill its employment needs by hiring the best qualified persons from the pool of available S.T.S. employees, no one can say. However, as previously indicated, the record is abundantly clear that at some point prior to February 3, 1975,[3] the date set by Respondent for receipt of employment applications, the determination had been made to hire less than a majority of its work force from among the group of former S.T.S. employees and thereby avoid the obligation to bargain with the Union. To implement this plan, Respondent placed an advertisement in "The Houston Chronicle" on February 2, seeking job applicants and, as a result of this ad, six employees were hired, four of whom were college students with no previous warehouse experience. Respondent also arranged for the transfer of two employees from another of its facilities and hired the son of the corporate president as a regular part-time employee. These nine employees were matched by the hiring of an equal number of former S.T.S. employees and thus Respondent's total work force was equally divided between former S.T.S. employees and employees hired from other sources.

In such circumstances as these, it seems quite reasonable to me to infer that the only reason that the eight discrimi-

[3] Unless otherwise indicated, all events occurred in 1975.

natees were not hired was because Respondent had reached the quota it discriminatorily established. But even if one considers each alleged discriminatee separately and attempts to divine what Respondent would have done if it had not been discriminatorily motivated, I think the result arrived at is the same. At the outset, it must be pointed out that on February 3 the Union made application for employment on behalf of all the former S.T.S. employees and the offer was subsequently rejected by Respondent on the patently false ground that the selections were to be made on the basis of ability. We have also found that the reasons offered by Respondent to justify its failure to hire employees Plater, Lewis, and Ware were contrived in an effort to mask its discriminatory quota system. One might then ask, are the reasons offered to support the failure to hire the other five alleged discriminatees any less contrived? I think the answer is no. Respondent did not hire S.T.S. employee Loring allegedly because his application indicated that he was applying for a position as truckdriver and Respondent had no plans for the hiring of truckdrivers at this facility. But Respondent was well aware of the fact that for the past 2 years Loring had worked as a warehouseman and not a truckdriver and, although Respondent claimed to be looking for qualified personnel, it did not offer an experienced warehouseman like Loring the opportunity to perform the very job he had been doing. S.T.S. employee Buckner's application form contains the notation that he failed to report for a job interview and Respondent claims this is the reason he was not hired. However, there is no evidence to indicate that Buckner was ever told to report for an interview. But, even assuming such a failure on Buckner's part, it is still difficult to attach such significance to the preemployment interview when you compare Buckner's situation with that of employee Curtis Mack. On

February 2, Respondent called Mack, a former S.T.S. employee, at his home and told him to report for work the next day. At the time of this telephone call, Mack had not even filed a job application, much less been interviewed, yet Barrett who professed to have no knowledge concerning the competency of the S.T.S. employees was willing to offer employment to an individual who had neither formally applied for employment nor had been interviewed. Former S.T.S. employees Hammonds and Alexander were not hired allegedly because they were injured and thus unavailable to begin work, immediately. Yet, at the time they made application for employment, neither of them was told that he would not be considered for employment because of his injuries, and later, when Hammonds was released for work by his doctor and again sought employment with Respondent, he was refused with no reason being given to him. Former S.T.S. employee Eddie Lee Armstrong did not file an application for employment and, if his situation were considered separate and apart from that of the other discriminatees, this would serve as a plausible explanation for his not being hired. But Armstrong's situation can not be considered in a vacuum and when one considers the fact that the Union had made application on behalf of all S.T.S. employees and the lengths Respondent was willing to go to employ Curtis Mack, the reason becomes less than persuasive.

Simply stated, once the evidence establishes, as it does here, that Respondent's hiring policies were discriminatorily motivated, a *prima facie* case for finding discrimination has been made out on behalf of each of the alleged discriminatees. It is then the Respondent's burden to come forward and establish that its failure to hire these individuals was for reasons totally unconnected with its discriminatory policies. This is not the case here. Accordingly, I would find the violation as to all eight of the alleged discriminatees involved here.

Dated, Washington, D.C. January 12, 1977

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Howard Jenkins, Jr., Member

National Labor Relations Board

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HOUSTON DISTRIBUTION SERVICES, INC., and
SOUTHWEST WAREHOUSE SERVICE,
Respondents.

No. 77-1486

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

May 19, 1978.

National Labor Relations Board brought action for enforcement of its order against employer. The Court of Appeals, Thornberry, Circuit Judge, held that: (1) evidence sustained finding that successor employer's refusal to hire three former employees of predecessor was the result of a plan to avoid dealing with union, and (2) evidence sustained finding that employer, as a successor employer, violated the Act by refusing to recognize and bargain with union.

Enforced.

1. Labor Relations Key 517

National Labor Relations Board is without power to initiate a proceeding without benefit of an underlying charge; however, the charge when made is not to be strictly construed. National Labor Relations Act, § 10(b) as amended 29 U.S.C.A. § 160(b).

2. Labor Relations Key 517

Where original charge named actual employer's wholly owned subsidiary, but administrative law judge amended complaint to include actual employer when he discovered the identity of the actual employer at hearing, the naming of the correct corporate entity as employer was not so

completely outside the original charge that National Labor Relations Board could be said to have initiated the proceeding of its own motion. National Labor Relations Act, § 10(b) as amended 29 U.S.C.A. § 160(b).

3. Labor Relations Key 559

Proper test to be applied in refusal to hire cases is whether there is substantial evidence of union animus, not whether employer's failure to hire employees was "solely" because of employees' affiliation with union. National Labor Relations Act, § 8(a)(1, 5) as amended 29 U.S.C.A. § 158(a)(1, 5).

4. Labor Relations Key 559

Evidence in preceeding before National Labor Relations Board sustained finding that successor employer's refusal to hire three former employees of predecessor was the result of a plan to avoid dealing with union. National Labor Relations Act, § 8(a)(1, 5) as amended 29 U.S.C.A. § 158(a)(1, 5).

5. Labor Relations Key 223

Successor employer is under no obligation to hire from pool of former employees of predecessor. National Labor Relations Act, § 8(a)(1, 5) as amended 29 U.S.C.A. § 158(a)(1, 5).

6. Labor Relations Key 372

Employer may discharge for good cause, bad cause or no cause at all, without violating the National Labor Relations Act, as long as his motivation is not antiunion discrimination and discharge is not punitive for legitimate concentrated activity protected under the Act. National Labor Relations Act, § 2 et seq. as amended 29 U.S.C.A. § 151 et seq.

7. Labor Relations Key 599

Mere existence of good cause for discharge is not enough to vitiate National Labor Relations Board's finding that discharge was the result of a plan to avoid dealing with union unless the good reason was a motivating cause of the discharge. National Labor Relations Act, § 8(a)(1, 3) as amended 29 U.S.C.A. § 158(a)(1, 3).

8. Labor Relations Key 521

Administrative law judge's holding that witness' competency to testify could be based on the color of his skin constituted an egregious violation of the federal rules, and Court of Appeals would only decline to refuse enforcement of National Labor Relations Board's order because of cumulative nature of witness' proposed testimony. Federal Rules of Evidence, rule 601, 28 U.S.C.A.

9. Labor Relations Key 574

Evidence in proceeding before National Labor Relations Board sustained finding that employer, as a successor employer, violated the National Labor Relations Act by refusing to recognize and bargain with union. National Labor Relations Act, § 8(a)(5) as amended 29 U.S.C.A. § 158(a)(5).

Application for Enforcement of an Order of the National Labor Relations Board.

Before THORNBERRY, GOLDBERG and CLARK, Circuit Judges.

THORNBERRY, Circuit Judge:

This is an application by the National Labor Relations Board for enforcement of its order issued against Houston

Distribution Services, Inc. (Houston Distribution) and Southwest Warehouse Services, Inc. (Southwest). The Board found that the respondent, a single employer consisting of the two companies, violated Sections 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. §151 et seq., by refusing to hire three employees formerly employed by its predecessor, Shipper's Transportation & Storage, Inc. (Shipper's), and by discharging four employees in order to avoid bargaining with the Union.[1] The Board further found that the respondent was a successor employer and that a majority of its employees in an appropriate unit had designated the Union as their collective bargaining representative and that the respondent had refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act. The Board's decision and order is reported at 227 N.L.R.B. No. 152 (1977). We grant enforcement.

I.

Southwest complains that the Board proceeded against it without a charging party ever naming Southwest. Southwest contends that the Board's action is in violation of 29 U.S.C. § 160(b) which requires the Board to issue a complaint pursuant only to a charge made by a charging party.[2]

The original charge named Houston Distributing and the Board issued a complaint against it. At the hearing before the Administrative Law Judge (ALJ), it was dis-

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[1] Teamsters Freight, Tank Line and Automobile Industry Employees Local Union No. 988.

[2] Section 10(b) of the Act provides:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board . . . shall have power to issue . . . a complaint stating the charges in that respect . . .

29 U.S.C. § 160(b).

covered that although the employees thought they worked for Houston Distribution, the actual employer was Southwest.[3] After this became apparent, the ALJ amended the complaint to include Southwest.

[1] While Southwest does not contend that the ALJ is without power to amend the complaint, it urges that the ALJ cannot do so without an underlying charge specifically naming Southwest. As Southwest correctly points out, the Board is without power to initiate a proceeding without benefit of an underlying charge, *NLRB* v. *Indiana & Michigan Elect. Co.*, 318 U.S. 9, 63 S.Ct. 394, 87 L.Ed. 579 (1943); *NLRB* v. *Westex Boot & Shoe Co.*, 190 F.2d 12, 13 (5 Cir. 1951); however, the charge when made is not to be strictly construed. In *Texas Industries, Inc.* v. *NLRB*, 336 F.2d 128, 132 (5 Cir. 1964), we said:

> It is established that this section precludes the Board from issuing a complaint on its own initiative and that a charge is a prerequisite to the institution of proceedings before the Board. *N.L.R.B.* v. *Kohler Co.*, 7 Cir. 1955, 220 F.2d 3. However, the charge is not a formal pleading, and its function is not to give notice to the respondent of the exact nature of the charges against him. *N.L.R.B.* v. *Fant Milling Co.*, 1959, 360 U.S. 301, 79 S.Ct. 1179, 3 L.Ed.2d 1243; *Consumers Power Co.* v. *N.L.R.B.*, 6 Cir. 1940, 113 F.2d 38. This is the function of the complaint. The charge rather, serves merely to set in motion the investigatory machinery of the Board. It is largely for the benefit of the Board, not the respondent, so that it may intelligently determine whether and to what extent an investigation is warranted. Consequently, the Board has considerable leeway to found a complaint on events other than those specifically set forth in the charge, the only limitation being that the Board may not get 'so completely outside * * * the charge that it

[3] Houston Distributing was wholly owned by Southwest.

> may be said to be initiating the proceeding on its own motion * * *.' *N.L.R.B.* v. *Kohler Co.*, supra. See also *N.L.R.B.* v. *Reliance Steel Products Co.*, 5 Cir. 1963, 322 F.2d 49; *N.L.R.B.* v. *Raymond Pearson, Inc.*, 5 Cir. 1957, 243 F.2d 456.

[2] We do not believe that the addition of the correct corporate entity is so completely outside the original charge that the Board could be said to have initiated a proceeding of its own motion. The distinction is between the total absence of a charge and a charge made, although not perfect in every particular. Workingmen are not required to wander the maze of corporate structure.

II.

The respondent next brings forward the obligatory substantial evidence point and an objection concerning the proper test to be applied in refusal to hire cases.

REFUSAL TO HIRE

Gary R. Stillwell is the owner of Southwest which in turn owns Houston Distribution. Stillwell was in the moving and storage business until April 1974 at which time he sold the moving part of his business and remained in the storage business. He operated Southwest which had two employees and was non-union. Stillwell was also a consultant for Weingarten Realty which owned Shipper's. Weingarten desired to sell its interest in Shipper's and Stillwell formed a new company, Houston Distributing, to take over Shipper's operation. Shipper's had approximately twenty-five employees and all were told that applications for employment would be available on February 3. Stillwell also ran a newspaper advertisement seeking qualified employees. Shipper's former employees were union members.

Nine former Shipper's employees were hired by Southwest. Six new employees were also hired. Former Shipper's employees Eugene Plater, Emmett Lewis, and Phillip Ware were not hired. The Board found that these men were not hired because of union animus.

THE PROPER BURDEN OF PROOF

[3] The respondent urges that the Board used the wrong standard in ascertaining the burden of proof in refusal to hire cases. The respondent insists that the only issue which the Board should have addressed was whether the failure to hire the three former employees was "solely" because of their affiliation with the Union. In *Howard Johnson Co., Inc.* v *Hotel Employees,* 417 U.S. 249, 94 S.Ct. 2236, 2243 n.8, 41 L.Ed.2d 46 (1974), Mr. Justice Marshall stated, "Thus, a new owner could not refuse to hire the employees of his predecessor solely because they were union members or to avoid having to recognize the union."

We do not think this comment was an attempt to formulate a test for burden of proof in successorship cases. Rather, this is a clear example of impermissible conduct on the part of a successor employer. We do not think that quotation from *Howard Johnson* addessed the case in which the employer had both permissible and impermissible motives in refusing to hire a predecessor's former employees. Indeed, after citing with approval two cases, neither of which adopts a "sole motivation" test, Mr. Justice Marshall further states, "There is no suggestion in this case that Howard Johnson in any way discriminated in its hiring against the former Grisson employees because of their union membership, activity, or representation." *Id.*

If the Board were to find for the employees only when union animus is the sole reason for the refusal to hire,

the Board could seldomly be upheld. We believe that the Board's task in these cases is to find substantial evidence of union animus. *NLRB* v. *Foodway of El Paso,* 496 F.2d 117, 119 (5 Cir. 1974); *K. B. & J. Young's Super Markets* v. *NLRB,* 377 F.2d 463 (9 Cir.), *cert. denied,* 389 U.S. 841, 88 S.Ct. 71, 19 L.Ed.2d 105 (1967); *Tri State Maintenance Corp.* v. *NLRB,* 132 U.S.App.D.C. 368, 408 F.2d 171 (1968).

SUBSTANTIAL EVIDENCE

[4] We are persuaded that the Board's conclusion that the three former workers were not hired as a result of a plan to avoid dealing with the Union is supported by substantial evidence.

[5] While it is plain that Southwest was under no obligation to hire the entire workforce of Shipper's *Tri State, supra,* 132 U.S.App.D.C. at 370, 408 F.2d at 173, or to hire exclusively from the pool of former workers, we think that Southwest's behavior toward this pool gives the Board adequate reason to hold that Southwest refused to hire the three employees in furtherance of a plan to avoid bargaining with the Union. First, it is undisputed that Stillwell was concerned about the employee quality at Shipper's warehouse. Given the twenty-five former workers to choose from, good business judgment would dictate that Southwest hire only the best workers from Shipper's. Nevertheless, Southwest never inquired about the quality of the workers, even though such inquiry could have easily been made. Second, the reasons advanced by Southwest for not hiring the three men justify the Board in imputing bad motive to Southwest. Southwest contends that Plater, Lewis, and Ware were rejected out of hand because they could not report to work immediately, their applications were either incomplete, ambiguous about the job sought, or without indications of previous warehousing experience. Although

their applications disclose that they were all willing to report for work no later than February 4, others similarly situated obtained employment from Southwest. The Southwest hiring agent knew that all of the applications were made by former Shipper's employees and that Shipper's had employed only warehousemen. It is therefore inconceivable that the hiring agent did not know that the potential employees were all experienced warehousemen regardless of any ambiguity in their applications. Furthermore, the agents made no attempt to question any of the applicants about their job history, skills, or job preference. We think that the Board was supported by substantial evidence on the record taken as a whole.[4]

DISCHARGE OF FOUR EMPLOYEES

[6] It is settled that an employer "may discharge for good cause, bad cause or no cause at all, without violating the Act, so long as his motivation is not anti union discrimination and the discharge is not punitive for legitimate concentrated activity protected under the Act." *Firestone Tire and Rubber Co.* v. *NLRB,* 449 F.2d 511, 513 (5 Cir. 1971).

[7] The proof adduced at the hearing shows that Wilford Davis, Curtis Mack, Raymond Mills, and Nathaniel Jones were discharged in the middle of a pay period without any misconduct proximate to their discharge. More

[4] The Board also points out that Southwest placed a newspaper advertisement seeking qualified employees. While such an advertisement, logically, could be a part of an anti-union plan, we do not think that the newspaper advertisement in itself can represent anti-unionism. The employer is under no obligation to hire from the pool of former Shipper's employees. Certainly, an employer who is under no obligation to hire from a particular pool of employees may seek qualified employees from the public at large.

telling is the fact that a Union meeting had been scheduled to follow shortly after the discharges. This timing evidence may give rise to the inference that the discharges were motivated by anti-unionism. *NLRB* v. *Central Power & Light Co.,* 425 F.2d 1318, 1322 (5 Cir. 1970). The respondent points to the fact that it had good cause to fire the four workers. However, the mere existence of good cause for the discharge is not enough to vitiate the Board's finding unless the good reason was a motivating cause of the discharge. *Central Power & Light Co., supra; NLRB* v. *Southeastern Stages,* 423 F.2d 878, 879 (5 Cir. 1970). This court has not adopted the "but for" test for determining union animus advanced by the First Circuit in *Coletti's Furniture, Inc.* v. *NLRB,* 550 F.2d 1292 (1 Cir. 1977). *See Federal-Mogul Corp.* v. *NLRB,* 566 F.2d 1245 (5 Cir. 1978).

[8] At this point the respondent objects to what may be fairly termed a remarkable colloquy between it and the ALJ. In order to show that some of the discharged employees were not good employees, the respondent called Brett Griffin to testify before ALJ Joel Harmatz. Griffin was hired by Southwest as a result of the newspaper advertisement placed by Southwest. He was termed throughout this proceeding as a "college student" although it appears that he was a full time employee of Southwest. Griffin is a union member, although not a member of the relevant union in this proceeding and he is white. The following are excerpts from the colloquy:

> JUDGE HARMATZ: I would also note for the record that Mr. Griffin and Mr. Tremble (phonetic are Caucasian, and that all of the alleged discriminatees are black people.
>
> MR. MADDOX: For clarification of counsel, what is the relevance of that point, your Honor?

JUDGE HARMATZ: It's something that suggests the possibility of bias, to be quite frank. It's a possibility. I don't know whether it exists, but I think that people, unfortunately, have allowed their subjection to their conditioning pattern in a community to influence their judgment as to people who do not particularly come from their racial background.

It's one of the factors that I consider this type of testimony to be strongly prejudicial about, which I am not going to accept as objective evidence on which I necessarily would have to make a credibility resolution.

* * * *

JUDGE HARMATZ: I think this is a matter of practical knowledge, and it relates to the competency of this man's testimony.

It relates to his capacity. It has some relationship from my perspective of considerations that bear upon whether testimony is competent, and whether a particular witness has a capacity to give such testimony. And I think it is relevant, and I want anybody who reviews me to take note of that circumstance.

* * * *

I have to consider the possibility of race influencing the objectivity of his judgment.

We have done as Judge Harmatz asks and we, as a reviewing court, have taken note of the fact that Judge Harmatz has held, among other things, that a witness' competency to testify can be based on the color of his skin. We are amazed.

The National Labor Relations Board is required to conduct its proceedings "so far as practicable" in accord with the federal rules of evidence. 29 C.F.R. §§ 101.10(a), 102.39 (1976). The word "practicable" is not a carte blanche to ignore the rules of evidence. This is a term with meaning and substance. There is no conceivable reason why NLRB

proceedings should not be conducted under the accepted rules of competency. Rule 601 Federal Rules of Evidence states:

> Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in acordance with State law.

See NLRB v. *Decker & Sons*, 569 F.2d 357 (5 Cir. 1978). We find it difficult to countenance such an egregious violation of the federal rules and only decline to refuse enforcement of the Board's order because of the cumulative nature of the proposed testimony.[5]

III.

[9] Finally, the Board found that the respondent, as a successor employer, violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union. Southwest contends that it is not a successor employer and is therefore not required to bargain with the Union. *Howard Johnson Co* v. *Hotel and Restaurant Employees and Bartenders Int'l Union*, 417 U.S. 249, 261-62, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974); *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 184 n.6, 94 S.Ct. 414, 38 L.Ed.2d 388

[5] It is further worth noting that distinguished historians from various viewpoints all agree that one of the primary reasons for the fourteenth amendment was the existence of "Black Codes" in some states which frequently prohibited blacks from testifying against whites. Agreement is universal that these codes were unconstitutional and it has long been thought that testimonial competency cannot be constitutionally based on race. Of course, the fourteenth amendment is directed at the states, but the same would hold true in an NLRB proceeding because of the fifth amendment. *See* R. Berger, Government by Judiciary, 26 (1977); H. Hyman, A More Perfect Union, 420 (Sentry Ed. 1973).

(1973): *Burns International Security Services, Inc.* v. *NLRB*, 406 U.S. 272, 280-81, n. 5, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972).

The Board argues that Southwest comes within the successorship doctrine because the essential nature of the business did not change[6] and more than one-half of Southwest's employees were union members.

The Board contends that the relevant measuring day to determine if the company had a majority of Union members is the initial day of operations. Southwest, on the other hand, contends that the relevant measuring day is after a full complement of employees had been employed and a shakedown period completed. The respondent urges either a six or nine week shakedown period. Southwest relies on the following statement in *Burns, supra,* 406 U.S. at 294-95, 92 S.Ct. at 1586:

> In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act, 29 U.S.C. § 159(a).

In *Pacific Hide & Fur Depot, Inc.* v. *NLRB,* 553 F.2d 609 (9 Cir. 1977), the Ninth Circuit in determining the relavant measuring date for successorship liability examined this passage from *Burns.* In rejecting the argument similar to the one advanced here by the Board, the court found that in some business situations, the first day of operations is not the controlling date for determining successorship liability and that in some cases the full complement of em-

[6] We agree that the employing industry remained substantially the same as its predecessor. *NLRB* v. *Zayre Corp.,* 424 F.2d 1159, 1162 (5 Cir. 1970).

ployees is not reached until after a period of business operations. We believe that the Ninth Circuit has correctly interpreted this passage from *Burns.* Practical business necessity requires that some new employers be given some time to change the character of the new business. The first day of operations does not, in every case, freeze time and solidify existing relations.

Using the *Pacific Hide* approach Southwest argues that it needed an opportunity to clean, organize and inventory the new facility as well as integrate the new facility with the old one before reaching a full complement of employees. Southwest contends that about sixty days after it took over operations the shakedown was complete and on that date since there were seven non-union workers and only four union workers there was no duty to bargain with the union.[7] *Pacific Hide* is in point, except for one very important distinction that the respondent neglects in its calculations. In *Pacific Hide* there was no improper refusal to hire and no improper firings. In the present case three workers were not hired because of Union bias and four were fired because of Union bias. As we stated in *NLRB* v. *Foodway of El Paso,* 496 F.2d 117 (5 Cir. 1974) at 120:

> Foodway next contends that substantial evidence fails to show that the Union represented a majority of the employees and that it was therefore under no duty to bargain with the Union. It is manifest that but for Foodway's discriminatory refusal to offer employment to Allied's unit employees, the Union would have continued to enjoy a majority representative status. We decline to permit an employer to rely upon its own

[7] In *Pacific Hide,* the Ninth Circuit found it unnecessary to determine the exact measuring day. Given our disposition of this case, we too, decline to name an exact measuring day. Our holding is that the measuring day in every case is not the first day of operation.

wrongdoing and thus avoid its legal responsibilities. *See Burns, supra,* at 280, n.5.

Including the seven Union members into the calculations, it is apparent that the Union represented more than one-half of the respondent's employees and the respondent has a duty to bargain with the Union.

ENFORCED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 77-1486

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HOUSTON DISTRIBUTION SERVICES, INC., and SOUTHWEST WAREHOUSE SERVICE,
Respondent.

JUDGMENT

Before: Thornberry, Goldberg and Clark, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, Houston Distribution Services, Inc., and Southwest Warehouse Service, Houston, Texas, its officers, agents, successors and assigns on January 12, 1977. The Court heard argument of respective counsel on November 10, 1977, and has considered the briefs and transcript of record filed in this cause. On May 19, 1978, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Respondent, Houston Distribution Services, Inc., and Southwest Warehouse Service, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

Costs are taxed against respondent.

ENTERED: June 26, 1978
Issued As Mandate:

CERTIFICATE OF SERVICE

I, DAVID T. MADDOX, attorney for Petitioners Houston Distribution Services, Inc. and Southwest Warehouse Services, Inc. hereby certify that on this 21st day of September, 1978, I have served three true and correct copies of the foregoing Appendix on Mr. Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, Office of the General Counsel, Washington, D. C., 20570 by mailing same through the United States mail to his address of record, air mail postage prepaid.

.....

DAVID T. MADDOX